Supreme Court, U.S.
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NO. 82-1049

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

HENRY WASHINGTON ERWIN, III,
Petitioner

V.

THE STATE OF TEXAS,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE TENTH
SUPREME JUDICIAL DISTRICT, WACO, TEXAS

RESPONDENT'S MEMORANDUM OPPOSING CERTIORARI

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ATTORNEYS FOR RESPONDENT

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES Jim Mattox, Attorney General of Texas, attorney for Respondent, and submits this his Memorandum Opposing Certiorari:

I.

The sole question presented by Petitioner is whether his judgment of conviction of conspiracy to engage in organized criminal activity under Tex. Penal Code Ann. §71.02(a)(5), should be reversed because the evidence at

his trial was insufficient.* This question is a plainly insubstantial one that does not merit plenary review by this Court. In its opinion affirming the judgment of conviction, the Tenth Supreme Judicial District of Texas summarized the evidence, which came from more than thirty witnesses and eighty-two exhibits introduced by the state alone, at great length. (Appendix A to the Petition at 1-8). The court concluded that there was sufficient evidence to show that Petitioner entered into the alleged combination with the intent to possess and import marijuana:

> "Viewed in a light most favorable to the verdict, we find that there was sufficient evidence to show such intent considering the following: the size of the plane and the expense of operating it; the modifications that were made for long distance flights; the illegal flights; the number of people involved; the use of aliases by co-conspirators; Harris' express declaration to Banks that the plane was to be used to 'run a load'; Appellant's denial that he knew Baldi and his lying about his passport; the sham corporation; payments in cash of large sums; the ties to Columbia."

(Appendix A to the Petition at 6).

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* Petitioner also urges that appellate affirmance of his conviction upon insufficient evidence shows that the underlying statute is unconstitutionally vague and indefinite. Plainly this is not a contention that the statute is facially invalid, a contention that was never raised in the court below. It is merely a variation on the theme that Petitioner was convicted upon insufficient evidence under *Jackson v. Virginia*, 443 U.S. 307 (1979).

Similarly, the court concluded that the evidence was sufficient to show that Petitioner had acted intentionally:

> "Evidence which showed Appellant's knowledge includes the following: he made several illegal flights and attempted to make other illegal flights; he saw tanks for extra fuel had been installed; he insisted in installing a new fuel pump; he rented the Austin apartment using an alias; he exited the U.S. in an unairworthy plane; he denied knowing Baldi; he lied about his passport."

(Appendix A to the Petition at 8).

Petitioner's argument amounts to a complaint that a rational trier of fact could not reasonably have found him guilty upon this state of the evidence.

II.

Plainly Petitioner fails to present a substantial federal question. He argues in effect that the outcome of his case should have been different under *Jackson v. Virginia*, 443 U.S. 307 (1979), but advocates no alteration of the standard of review set forth in *Jackson v. Virginia*. Instead, he complains of its routine and unexceptional application in his case. He sets forth no conflicting case from any jurisdiction. Accordingly, there are no "special and important reasons" for granting review in this case. S.Ct.R. 17.

Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

GILBERT J. PENA
Assistant Attorney General
Chief, Enforcement Division

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Attorneys for Respondent

January ____, 1983.

PROOF OF SERVICE

I, Douglas M. Becker, Assistant Attorney General of Texas, do hereby certify that on the ____ day of January, 1983, three copies of the Memorandum Opposing Certiorari were mailed, postage prepaid, to Mr. Paul E. Gartner, 500 Citizens Tower, Waco, Texas 76701, and to Mr. Joseph (Sib) Abraham, Jr., and Mr. Charles Louis Roberts, Attorneys at Law, P.O. Box D, El Paso, Texas 79951-0004. All parties required to be served have been served. I am a member of the Bar of this Court.

DOUGLAS M. BECKER
Assistant Attorney General
Attorney for Respondent

SUBSCRIBED AND SWORN to before me this _____ day of January, 1983.

NOTARY PUBLIC in and for
Travis County, Texas